

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

7 RICHARD HACKER,)
8 Plaintiff,) No. CV-08-094-CI
9 v.) ORDER DENYING PLAINTIFF'S
10 MICHAEL J. ASTRUE, Commissioner) MOTION FOR SUMMARY JUDGMENT
11 of Social Security,) AND GRANTING DEFENDANT'S
12 Defendant.) MOTION FOR SUMMARY JUDGMENT

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 11.) Attorney Lora Lee Stover represents Richard Hacker (Plaintiff); Special Assistant United States Attorney Richard M. Rodriguez represents the Commissioner of Social Security (Defendant). The parties have consented to proceed before a magistrate judge. (Ct. Rec. 4.) After reviewing the administrative record and briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment, and directs entry of judgment for Defendant.

JURISDICTION

24 Plaintiff filed for disability benefits (DIB) on April 16,
25 2004. (Tr. 57.) His claim was denied in July 2004, and he did not
26 appeal the denial. (Tr. 49, 371.) Plaintiff reapplied for DIB on
27 November 22, 2004. (Tr. 52-53, 371.) He alleged disability due to
28 a back condition and blindness in his right eye, with an onset date

1 of June 27, 1997. (Tr. 65, 374.) His claim was denied initially
2 and on reconsideration. Plaintiff requested a hearing before an
3 administrative law judge (ALJ), which was held in March 22, 2007,
4 before ALJ Richard Say. (Tr. 28, 46, 367-97.) Plaintiff and
5 vocational expert K. Diane Kramer (VE) testified. (Tr. 368.) The
6 ALJ denied benefits on April 16, 2007, and the Appeals Council
7 denied review. (Tr. 19-27, 6-9.) The instant matter is before this
8 court pursuant to 42 U.S.C. § 405(g).

9 **STATEMENT OF THE CASE**

10 The facts of the case are set forth in detail in the transcript
11 of proceedings, and are briefly summarized here. At the time of the
12 alleged onset date, Plaintiff was 36 years old with a high school
13 equivalency degree. (Tr. 71, 391.) Plaintiff has past work
14 experience as a sprinkler system installation specialist, a
15 warehouse manager and a clerk. (Tr. 66, 98.) He injured his back
16 in June 1997, while working as a warehouse manager for a sprinkler
17 installation company. (Tr. 103.) He filed a workers compensation
18 claim and received medical treatment, including back surgery, from
19 1997 through 1998. In November 1998, his doctor released him back
20 to work at a light duty position of inside sales for his employer.
21 (Tr. 235-36.) He declined that position and reported working on his
22 own. (Tr. 144, 236.)

23 At the time of the ALJ hearing, Plaintiff was 40 years old and
24 living with his spouse of two years and her son in their house. (Tr.
25 373, 384.) His workers compensation claim had been reopened in
26 2004, due to complaints of increasing back pain. (Tr. 241, 371.)
27 Plaintiff testified his spouse had to help him with activities of
28

1 daily living, and she did all of the house upkeep. (Tr. 376, 378.)
2 Plaintiff testified prior to 2002, he could lift 25 pounds from a
3 desk, 10 to 15 pounds from the floor, sit comfortably for 10 to 15
4 minutes before having to stretch. (Tr. 380.) He stated he declined
5 the light duty job offered in 2001 because he knew he could not
6 perform the work of counter sales. (Tr. 388.)

7 **ADMINISTRATIVE DECISION**

8 The ALJ found Plaintiff's date of last insured for DIB purposes
9 was December 31, 2002. (Tr. 21.) At step one, ALJ Say found
10 Plaintiff had not engaged in substantial gainful activity during the
11 relevant time. (*Id.*) At step two, he found Plaintiff had severe
12 impairments of "post discectomy L5-S1, mild congenital spinal
13 stenosis, L3-4; mild degenerative changes most prominent at L5-S1;
14 obesity; and left knee pain, unclear etiology," through the date of
15 late insured. (*Id.*) The ALJ determined at step three these
16 impairments, alone and in combination, did not meet or medically
17 equal one of the listed impairments in 20 C.F.R., Appendix 1,
18 Subpart P, Regulations No. 4 (Listings). (Tr. 23.) In regards to
19 Plaintiff's right eye blindness, which caused some limits in depth
20 perception, and allegations of hearing loss, the ALJ found these
21 conditions did not limit his ability to perform work-related
22 activities. (Tr. 22.) The ALJ found Plaintiff's symptom
23 allegations were not entirely credible. (Tr. 24.) At step four, he
24 determined Plaintiff had the following residual functional capacity
25 (RFC):

26 [T]hrough the date of last insured, the claimant had the
27 residual functional capacity to perform less than the full
28 range of light work with occasional climbing of ramps and
stairs, balancing, stooping, kneeling, crouch, and

1 crawling. He should avoid climbing ladders, ropes and
 2 scaffolds, repetitive use of the left leg, and vibration.
 3 The claimant also has limited depth perception and needs
 4 to avoid noisy environments.

5 (Tr. 23.)

6 He found Plaintiff could not perform past relevant work. (Tr.
 7 26.) Considering vocational expert testimony and the record in its
 8 entirety, the ALJ concluded Plaintiff's impairments and his RFC
 9 during the insured period did not preclude Plaintiff from performing
 10 work as an industrial order clerk, a shipping checker and sales
 11 clerk, as defined in the *Dictionary of Occupational Titles*. (Tr.
 12 27.) Therefore, Plaintiff was not under a "disability" as defined
 13 by the Social Security Act. (Tr. 27.)

14 **STANDARD OF REVIEW**

15 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9th Cir. 2001), the
 16 court set out the standard of review:

17 A district court's order upholding the Commissioner's
 18 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,
 19 211 F.3d 1172, 1174 (9th Cir. 2000). The decision of the
 20 Commissioner may be reversed only if it is not supported
 21 by substantial evidence or if it is based on legal error.
 22 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9th Cir. 1999).
 23 Substantial evidence is defined as being more than a mere
 24 scintilla, but less than a preponderance. *Id.* at 1098.
 25 Put another way, substantial evidence is such relevant
 26 evidence as a reasonable mind might accept as adequate to
 27 support a conclusion. *Richardson v. Perales*, 402 U.S.
 28 389, 401 (1971). If the evidence is susceptible to more
 29 than one rational interpretation, the court may not
 30 substitute its judgment for that of the Commissioner.
Tackett, 180 F.3d at 1097; *Morgan v. Commissioner of
 Social Sec. Admin.*, 169 F.3d 595, 599 (9th Cir. 1999).

31 The ALJ is responsible for determining credibility,
 32 resolving conflicts in medical testimony, and resolving
 33 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th
 34 Cir. 1995). The ALJ's determinations of law are reviewed
 35 *de novo*, although deference is owed to a reasonable
 36 construction of the applicable statutes. *McNatt v. Apfel*,
 37 201 F.3d 1084, 1087 (9th Cir. 2000).

SEQUENTIAL PROCESS

Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the requirements necessary to establish disability:

Under the Social Security Act, individuals who are "under a disability" are eligible to receive benefits. 42 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any medically determinable physical or mental impairment" which prevents one from engaging "in any substantial gainful activity" and is expected to result in death or last "for a continuous period of not less than 12 months." 42 U.S.C. § 423(d)(1)(A). Such an impairment must result from "anatomical, physiological, or psychological abnormalities which are demonstrable by medically acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a claimant will be eligible for benefits only if his impairments "are of such severity that he is not only unable to do his previous work but cannot, considering his age, education and work experience, engage in any other kind of substantial gainful work which exists in the national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus, the definition of disability consists of both medical and vocational components.

In evaluating whether a claimant suffers from a disability, an ALJ must apply a five-step sequential inquiry addressing both components of the definition, until a question is answered affirmatively or negatively in such a way that an ultimate determination can be made. 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The claimant bears the burden of proving that [s]he is disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999). This requires the presentation of "complete and detailed objective medical reports of h[is] condition from licensed medical professionals." *Id.* (citing 20 C.F.R. §§ 404.1512(a)-(b), 404.1513(d)).

It is the role of the trier of fact, not this court, to resolve conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence supports more than one rational interpretation, the court may not substitute its judgment for that of the Commissioner. *Tackett*, 180 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984). Nevertheless, a decision supported by substantial evidence will still be set aside if the proper legal standards were not applied in

1 weighing the evidence and making the decision. *Brawner v. Secretary*
 2 *of Health and Human Services*, 839 F.2d 432, 433 (9th Cir. 1988). If
 3 there is substantial evidence to support the administrative
 4 findings, or if there is conflicting evidence that will support a
 5 finding of either disability or non-disability, the finding of the
 6 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-
 7 1230 (9th Cir. 1987).

8 **ISSUES**

9 The question is whether the ALJ's decision is supported by
 10 substantial evidence and free of legal error. Plaintiff argues the
 11 ALJ erred when he: (1) failed to call a medical expert at step
 12 three; (2) assessed Plaintiff's credibility and pain complaints; (3)
 13 assessed his RFC; and (4) failed to include all limitations in the
 14 hypothetical question at step five. He asserts the record in its
 15 entirety does not support the ALJ's denial of benefits. (Ct. Rec. 10
 16 at 9, 11-13.)

17 **DISCUSSION**

18 **A. Period at Issue: June 27, 1997 through December 31, 2002**

19 To receive benefits under Title II of the Social Security Act,
 20 Plaintiff must provide evidence that he was disabled from his
 21 alleged date of onset up through his date of last insured. 42
 22 U.S.C. § 402 (a)(1). It is undisputed that Plaintiff's period of
 23 insured ended on December 31, 2002; therefore, evidence of further
 24 deterioration of Plaintiff's condition is irrelevant to the
 25 determination of disability for DIB.¹ *Weetman v. Sullivan*, 877 F.2d

26
 27 ¹ Plaintiff is not precluded, however, from filing an
 28 application for supplement security income under Title XVI of the

1 20, 22 (9th Cir. 1989). The ALJ properly considered medical records
 2 and Plaintiff's testimony that dealt with the relevant period of
 3 time. *Id.* (Tr. 24-26.)

4 **B. Credibility**

5 When the ALJ finds a claimant's statements as to the severity
 6 of impairments, pain and limitations are not credible, the ALJ must
 7 make a credibility determination with findings sufficiently specific
 8 to permit the court to conclude the ALJ did not arbitrarily
 9 discredit claimant's allegations. *Thomas v. Barnhart*, 278 F.3d 947,
 10 958-959 (9th Cir. 2002); *Bunnell v. Sullivan*, 947 F.2d 341, 345-46
 11 (9th Cir. 1991) (en banc). If there is no affirmative evidence that
 12 the claimant is malingering, the ALJ must provide "clear and
 13 convincing" reasons for rejecting the claimant's allegations
 14 regarding the severity of symptoms. *Reddick v. Chater*, 157 F.3d 715,
 15 722 (9th Cir. 1998). The ALJ must engage in a two-step analysis in
 16 deciding whether to admit a claimant's subjective symptom testimony.
 17 *Smolen v. Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996).

18 Under the first step, the ALJ must find the claimant has
 19 produced objective medical evidence of an underlying "impairment,"
 20 and that the impairment, or a combination of impairments, "could
 21 reasonably be expected to produce pain or other symptoms." *Cotton*
 22 *v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986). Once the *Cotton* test
 23 is met, the ALJ must evaluate the credibility of the claimant. In
 24 addition to ordinary techniques of credibility evaluation, the ALJ
 25 may consider the following factors when weighing the claimant's
 26 credibility: the claimant's reputation for truthfulness,
 27

28 Social Security Act.

1 inconsistencies either in his allegations of limitations or between
2 his statements and conduct, daily activities and work record, and
3 testimony from physicians and third parties concerning the nature,
4 severity, and effect of the alleged symptoms. *Light v. Social Sec.*
5 *Admin.*, 119 F.3d 789, 792 (9th Cir. 1997); *Fair v. Bowen*, 885 F.2d
6 597 n.5 (9th Cir. 1989). If the ALJ's credibility finding is
7 supported by substantial evidence in the record, the court may not
8 engage in second-guessing. See *Morgan*, 169 F.3d at 600; *Fair*, 855
9 F.2d at 604 ("[c]redibility determinations are the province of the
10 ALJ.").

11 Although Plaintiff does not specify which testimony was
12 improperly rejected or which credibility findings are unsupported,
13 an independent review of the entire record and the ALJ's decision
14 indicates the ALJ did not err in his credibility findings. The ALJ
15 thoroughly summarized the medical evidence and Plaintiff's testimony
16 relevant to the period during which Plaintiff was insured. He
17 specifically noted Plaintiff testified that after back surgery in
18 2002, he still could not sleep well. He stated he suffered leg pain
19 which worsened when he moved around; walking for one half hour would
20 make him unable to function the next day; the heaviest weight he
21 could lift was 15 to 25 pounds depending on his position; he could
22 sit for about 10 to 15 minutes; his right eye blindness affected his
23 ability to judge distance and caused eye strain in his good eye,
24 headache and difficulty in concentrating; and he suffered hearing
25 loss, but had not had his hearing assessed or treated. (Tr. 23-24.)
26 The ALJ also noted Plaintiff's testimony that he declined an offer
27 of light duty work in November 1998, because "he knew he could not
28

1 do counter sales." (Tr. 24.)

2 An ALJ cannot be required to believe every allegation of
 3 disabling pain, or else disability benefits would be
 4 available for the asking, a result plainly contrary to 42
 5 U.S.C. § 423 (d)(5)(A). . . . This holds true even where
 6 the claimant introduces medical evidence showing that he
 7 has an ailment reasonably expected to produce *some* pain;
 8 many medical conditions produce pain not severe enough to
 9 preclude gainful employment.

10 *Fair*, 885 F.2d at 603. Subjective complaints alone cannot be the
 11 basis for a finding of disability. Further, the ALJ need not
 12 completely reject nor completely accept the claimant's allegations.

13 *Social Security Ruling (SSR) 96-7p*. ALJ Say gave "clear and
 14 convincing" reasons for discounting Plaintiff's testimony as it
 15 related to the period at issue. He found treatment for Plaintiff's
 16 back condition was routine and conservative, and back surgery was
 17 generally successful. In support of this finding, the ALJ
 18 referenced the neurosurgeon's notes reporting Plaintiff's leg pain
 19 had resolved, but he was bothered by back pain. (Tr. 24, 120.) The
 20 ALJ found imaging showed no ongoing nerve compression to explain
 21 back pain, and Plaintiff ultimately benefitted from conservative
 22 medication. (Tr. 24, 120-22.) Finally, the ALJ found medical
 23 opinions from Plaintiff's treating doctor, Dr. Rempel, indicated
 24 Plaintiff was capable of light duty work in October 1998. (Tr. 24,
 25 235.) Physician notes indicate Plaintiff reported doing best if he
 26 changed positions regularly, and stated other symptoms were
 27 controlled with activity. (Tr. 25, 236.)

28 A lack of objective medical evidence to establish severity of
 29 pain is a relevant factor to consider in credibility assessments, as
 30 long as it is not the only factor. *Rollins v. Massanari*, 261 F.3d
 31 853, 857 (9th Cir. 2001); *Bunnell*, 947 F.2d at 345. The ALJ gave

1 other reasons for discounting Plaintiff's pain testimony: there were
2 periods during Plaintiff's disability period when he did not take
3 medication or seek treatment for symptoms; Plaintiff reported he was
4 able to manage his symptoms with conservative measures between 1998
5 and 2004; there is no medical evidence of complaints or treatment
6 from 1998 until 2004, when Plaintiff sought to reopen his workers
7 compensation claim; he testified he declined light duty work in
8 1998, because he knew he could not do counter sales, but November
9 1998 reports indicated he declined because he had other work
10 options; and he returned to gainful employment in 1998, which he
11 reported was "going well." (Tr. 25, 144, 238.) The ALJ also noted
12 Plaintiff did not complain of eyesight or hearing limitations during
13 the relevant period. (*Id.*) These specific reasons for discounting
14 subjective complaints are "clear and convincing" and fully supported
15 by the record.

16 Although the record supports the ALJ's findings that Plaintiff
17 experienced some limitations due to his back condition and knee
18 pain, the evidence in its entirety was rationally interpreted to
19 support a finding that Plaintiff's subjective complaints of
20 disabling pain are not credible.

21 **C. Step Four - Residual Functional Capacity Determination**

22 It is well settled that the ALJ is "responsible for determining
23 credibility, resolving conflicts in medical testimony and for
24 resolving ambiguities," in these proceedings. *Richardson*, 402 U.S.
25 at 400; *Andrews*, 53 F.3d at 1039; *SSR* 96-8p. The final
26 determination regarding a claimant's ability to perform basic work
27 is the sole responsibility of the Commissioner. 20 C.F.R. §
28 404.1546; *SSR* 96-5p (RFC assessment is an administrative finding of

1 fact reserved to the Commissioner). No special significance is
2 given to a medical source opinion on issues reserved to the
3 Commissioner. 20 C.F.R. §§ 404.1527(e). Further, where an
4 adjudicator's determination is a rational interpretation of the
5 evidence, the court will not substitute its judgment for that of the
6 Commissioner. *Tackett*, 180 F.3d at 1097.

7 Plaintiff first appears to argue that without medical expert
8 testimony, the ALJ's step three finding is not supported by
9 substantial evidence. (Ct. Rec. 10 at 11.) This argument is
10 without merit. The decision to call a medical expert for additional
11 evidence on the nature and severity of impairments is within the
12 discretion of the ALJ. Testimony from a medical expert is required
13 only "[w]hen . . . in the opinion of the [ALJ] or the Appeals
14 Council the symptoms, signs and laboratory findings reported in the
15 case record suggest that a judgment of equivalence may be
16 reasonable." SSR 96-6p. Here, the record does not suggest
17 reasonably that equivalency is an issue during Plaintiff's insured
18 period, and Plaintiff references no evidence that would suggest he
19 meets a Listing. On the contrary, Plaintiff's back condition was
20 treated successfully with conservative treatment and surgical
21 intervention. (Tr. 109-21.) As noted by Plaintiff in his
22 argument, in November 1998, Plaintiff's treating physician indicated
23 his condition was fixed and stable and he was capable of returning
24 full time to light work. (Ct. Rec. 10 at 11; Tr. 236.) Plaintiff
25 does not controvert his treating physician's opinion. This opinion
26 properly was given significant weight by the ALJ. *Lester v. Chater*,
27 81 F.3d 821, 830 (9th Cir. 1995); (Tr. 25). The ALJ was not required
28 to call a medical expert and did not err at step three.

1 Plaintiff also argues the ALJ failed to fully evaluate the
 2 medical evidence in determining his RFC. However, the ALJ properly
 3 found Plaintiff retained the ability to do light work. (Tr. 23.) He
 4 based this finding on Plaintiff's testimony that in 2002, he could
 5 lift from 15 to 25 pounds, and the fact that his treating physician
 6 opined Plaintiff could do light duty work in 1998, work that the
 7 Plaintiff declined because he had other work options at the time.
 8 (Tr. 23, 25, 379-80.) Regarding postural limitations, depth
 9 perception limitations, and the need to avoid noisy environments,
 10 repetitive use of the left leg, and vibration, these restrictions
 11 are consistent with the severe impairments established by
 12 uncontroverted medical evidence prior to Plaintiff's date of last
 13 insured and Plaintiff's credible testimony, as discounted by the ALJ
 14 in his credibility findings. (Tr. 23-25, 237-39, 379-80, 383.)
 15 Considering the record in its entirety, the evidence reasonably
 16 supports the ALJ's RFC determination.

17 **D. Step Five - Hypothetical Question**

18 Plaintiff contends the ALJ erred at step five by presenting an
 19 incomplete hypothetical to the VE. (Ct. Rec. 10 at 13.) At step
 20 five, the burden of proof shifts to the Commissioner to show there
 21 is a significant number of jobs in the national economy that
 22 Plaintiff can still perform. *Kail v. Heckler*, 722 F.2d 1496, 1498
 23 (9th Cir. 1984). The ALJ may rely on vocational expert testimony if
 24 the hypothetical presented to the expert includes all functional
 25 limitations supported by the record and found credible by the ALJ.
 26 *Bayliss v. Barnhart*, 427 F.3d 1211, 1217 (9th Cir. 2005).

27 Having found Plaintiff could no longer perform his past
 28 relevant work, the ALJ proceeded to step five and presented the

1 following hypothetical individual to the VE:

2 [A] younger individual with the equivalent of high school
3 education who has the ability to read, write and use
4 numbers. He has a work history that [the VE] just
5 described. He said he is limited to light exertional
6 level activities. He also has functional limitations one,
7 because of the loss of his right eye he would have limited
8 depth perception. He can only occasionally stoop, crouch,
9 crawl, kneel, balance, climb stairs. Should never climb
10 ladders, ropes and scaffolds. He's described a left knee
11 problem. . . . [H]e would be unable to use his left lower
12 extremity for repetitive movements other than walking. He
13 should avoid activities involving vibration. Assume
14 further that this individual is afflicted with symptoms
15 from various sources including mild to moderate chronic
pain which is of sufficient severity to be noticeable to
him at all times, but he would be able to remain attentive
and responsive in a work setting and could carry out
normal work assignments satisfactorily. Further assume
that he takes medication for relief of his symptoms, but
medications would not prevent him from functioning at the
level indicated and he would remain reasonably able to
perform required functions presented by his work setting.
Assume further that while functioning at the level
indication [sic] he would find it necessary to change
positions from time to time to relieve his symptoms. If
he's working seated he may have to stand up every hour or
so for a few minutes or [be] able to move around a little
at the work station.

16 (Tr. 391-92.)

17 The hypothetical reflects limitations in the ALJ's final RFC
18 determination discussed above. (Tr. 23.) In addition, limitations
19 due to pain and medication, right eye loss and hearing problems, and
20 Plaintiff's self-reported need to change positions to relieve pain
21 were presented in the hypothetical. The restrictions considered by
22 the VE in her testimony are fully supported by the record and
23 Plaintiff's testimony deemed credible by the ALJ. See *Parra v.*
24 *Astrue*, 481 F.3d 742, 750 (9th Cir. 2007), cert denied, 128 S.Ct.
25 1068 (2008). The VE identified transferable positions that could be
26 performed by Plaintiff: industrial order clerk, shipping checker,
27 and sales clerk, as defined by the *Dictionary of Occupational*

1 *Titles.* (Tr. 392-93). The Commissioner met his burden at step
2 five.

CONCLUSION

4 The ALJ thoroughly detailed the medical evidence in the record
5 and properly assessed Plaintiff's ability to perform work
6 activities. His detailed credibility findings are "clear and
7 convincing." His determination of non-disability is based on
8 substantial evidence and free of legal error. Accordingly,

IT IS ORDERED:

10 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is
11 **DENIED**;

12 2. Defendant's Motion for Summary Judgment (Ct. Rec. 11) is
GRANTED.

14 The District Court Executive is directed to file this Order and
15 provide a copy to counsel for Plaintiff and Defendant. Judgment
16 shall be entered for Defendant, and the file shall be **CLOSED**.

DATED February 11, 2009.

S/ CYNTHIA IMBROGNO
UNITED STATES MAGISTRATE JUDGE